INDEX.

Decision of the Court below 1
Jurisdiction 1
Statement of the Case 1
Question Involved 1, 2
Laws Applicable 2
Argument 3
Point I 3
Point II 4
Point III 6
Point IV 8

STATUTES CITED.

Section 288, Ch. 7, Title 28, U. S. C. 1
Section 900 of the Revenue Act of 1921 . . . . . 1, 2
Section 600 of the Revenue Act of 1924 . . . . . 1, 2

CASES CITED

Walker Manufacturing Co. *v.* United States 2, 8
Gould Storage Battery Co. *v.* United States 2, 8
Advance Automobile Accessories Corp. *v.* United States . 2, 8
Berg and Beck Co. *v.* United States 2, 8
Edison Storage Battery Co. *v.* United States 2, 3, 8
Fairmount Tool & Forging Co. *v.* United States 3
Magone *v.* Wiederer 4, 5, 8
Milwater Kent Manufacturing Co. *v.* United States . . 5, 6, 8
Milwaukee Motor Products Co. *v.* United States 6, 9
U. S. *v.* Wigglesworth 6, 7
Gould *v.* Gould 6
Am. Net and Twine Co. *v.* Worthington 7
Swanger *v.* U. S. 7
U. S. *v.* Temple 7
U. S. *v.* Standard Brewery 7
U. S. *v.* Field 7
U. S. *v.* Merriam 7
Schwab *v.* Doyle 7

IN THE

Supreme Court of the United States.

October Term, 1929.

No. 350.

THE BASSICK MANUFACTURING COMPANY, *Petitioner*,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Court of Claims on June 10, 1929, filed its special findings of fact, conclusion of law and brief memorandum opinion (not yet reported but found in the printed record, pp. 9–15) deciding, as a conclusion of law, that plaintiff was not entitled to recover, and dismissed its petition and entered judgment accordingly (R. 14–15). The question presented involves the construction of Section 900(3) of the Revenue Act of 1921 (42 Stat. 227, 291), and Section 600(3) of the Revenue Act of 1924 (43 Stat. 253, 322) imposing taxes on sales of parts and accessories for automobiles and is one that has not been settled but should be in as much as it affects a large number of manufacturers, producers, and importers and a great variety of articles. The jurisdiction of the Court is invoked under §288 (a) and (b), Chap. 7, Title 28, U. S. C.

STATEMENT OF THE CASE.

Petitioner is a manufacturer and distributor, among other things, of a device or article commercially designated and known as a gascolator. This is a device used on or in connec-

tion with gasoline engines. It is connected with the fuel or feed line at some point between the gasoline tank and the carburetor and its purpose or function is to strain the gasoline so as to prevent dirt, water, grit, or other foreign matter from reaching the carburetor. The gascolator manufactured and sold by petitioner is adaptable for use and is used not only on automobile engines, but also on engines used to propel airplanes, motor boats, and to operate various kinds of industrial and agricultural machinery. And a gascolator used on an automobile engine is equally adaptable for use on a gasoline engine used for any other purpose.

Section 900(3) of the Revenue Act of 1921 (Ch. 136, 42 Stat. 227, 291) imposed an excise tax equivalent to 5% of the price for which parts or accessories for automobiles were sold (see R. 4 for text of statute). Section 600(3) of the Revenue Act of 1924 (Ch. 234, 43 Stat. 253, 322) continued this tax in force, but reduced the rate to 2½% (R. 6). The Commissioner of Internal Revenue held that the taxes imposed by said sections applied to sales of gascolators made by petitioner; in other words, that the gascolator manufactured and sold by petitioner was a part or accessory for an automobile, notwithstanding the fact, clearly established by the record, that it was adaptable and generally used for other purposes. Accordingly, taxes amounting to $15,616.01 were assessed against and collected from petitioner on gascolator sales made during the period September, 1922, to February, 1926.

The question is whether a gascolator as herein described, or any other article adaptable as well for use on other machines as on automobiles, is subject to the tax imposed on sales of automobile parts or accessories by the Revenue Acts of 1921 and 1924, *supra*. The Court of Claims in its brief memorandum opinion simply said (R. 14):

> "This case is controlled by the decision of this court in *Walker Manufacturing Co.* v. *United States*, 65 C. Cls. 394; *Cole Storage Battery Co.* v. *United States*, 65 C. Cls. 164; *Advance Automobile Accessories Corp.* v. *United States*, No. H–3, decided October 22, 1928; *Borg and Beck Co.* v. *United States*, No. H–437, decided March 11, 1929; *Edison*

Storage Battery Co. v. *United States*, No. F-359, decided May 6, 1929; *Fairmount Tool and Forging Company* v. *United States*, No. J-106, decided June 3, 1929."

The cases above cited and relied upon by the Court of Claims will be hereinafter discussed.

ARGUMENT.

I.

The decision of the Court of Claims involves a question, and a very important question, of Federal taxation which has not been but should be settled by this court because it affects a large number of manufacturers, producers and importers, and innumerable articles the use of which in relation to automobiles is similar to if not identical with that of the article here involved.

Petitioner does not deny that its product—gascolator—is a useful and desirable accessory for an automobile engine. Indeed, it advertises and holds it out to the automotive trade as such. But it is not a necessary accessory and its utility is not limited to automobile engines or motors. It is sold by petitioner to and used by owners of gasoline engines used for the propulsion or operation of many and various kinds of machines. So are gascolators manufactured and sold by other manufacturers. And, likewise, the principle laid down by the Court of Claims in this case, if permitted to stand, necessarily will apply to other articles which may be and no doubt are useful to automobile operators, but which also are convenient and useful to owners and operators of other machines which do not come within the purview of the taxing Acts. Obviously, it would be futile if not impossible to attempt to enumerate all of the articles which would come within this principle. An example or two, it is believed, will suffice. For instance: a hammer, a monkey-wrench, an oil can, a screw-driver. Each and every one of these tools or implements will ordinarily be found in the tool chest of automobile owners. This is a matter of which it is believed the court may properly take judicial notice. And we believe

also that the court will take judicial notice of the fact that each and every one of the tools or implements mentioned is useful, if not necessary, to owners or operators of machines other than automobiles. For example, any or either of them may be and frequently are used by owners and operators of lawn mowers and threshing machines.

II.

The provisions of the taxing statutes should be restricted to articles the principal or chief use of which is limited to automobiles.

This proposition is so firmly established by a long line of decisions by this court that it seems unnecessary to discuss it at length. In *Magone* v. *Wiederer*, 159 U. S. 555, will be found a review of the adjudications of the court as to the rule of chief or predominant use in determining the classification of an article for tax purposes. In that case the question was whether glass cut to certain sizes and shapes were "parts" of clocks. On this question the court below charged the jury as follows:

> "In determining this question, whether or not these articles are parts of clocks, it will not be necessary for you to say that they were exclusively used for that purpose. An article may be chiefly used for a certain purpose and be diverted from its principal use; somebody may put it to a purpose for which it was not originally intended. That could not, in my judgment, change its tariff nomenclature. The Supreme Court, in a case which I think is somewhat similar upon the facts, although relating to different sections of the statute, sustained a charge to the jury 'that the use to which the articles were chiefly adapted and for which they were used determined their character within the meaning of the statute. * * *' And so I will say to you, as the law of the case, as I understand it, that if you find that these articles were chiefly used as parts of clocks, that that would determine their tariff classification. But it is entirely clear, upon the other hand, that they must be chiefly and principally used for that purpose. If they are articles, all, or one or more, as the case may be, which have no distinguishing char-

> acteristics, which are just as applicable for use in fancy boxes or in coach lamps as they are for clocks, just as applicable to the one use as to the other, then it would be entirely proper to say that they have no distinguishing characteristics as parts of clocks. They might be used for one purpose just as well as for another. And if you find as to those articles, or any of them, that they have several uses to which they are perfectly applicable, then as to those articles your verdict should be for the defendant."

This charge was sustained by this Court which in its opinion, delivered by Mr. Justice White, said:

> "The charge given by the court below, and which was excepted to, was manifestly correct, for in giving the rule of chief use the principles by which chief use was to be ascertained were fully stated exactly in accordance with the law subsequently announced by this court in *Magone* v. *Heller*. * * *"

While *Magone* v. *Wiederer* and the cases therein cited and referred to, related to the classification for tax purposes of articles under customs tariff acts, it is respectfully submitted that the principle is equally applicable in the determination of the taxable status of articles under internal revenue laws. This was recognized by the Court of Claims in *Atwater Kent Manufacturing Co.* v. *United States*, 62 C. Cls. 419. In that case the question presented was whether timers and coils for internal combustion engines were taxable under the very provision of the Revenue Act of 1921 (Section 900 (3)) under the purported authority of which the taxes here involved were assessed and collected. The Court of Claims having found as a fact that said timers and coils were adaptable for use on internal combustion engines other than those used for the propulsion of automobiles, held that plaintiff was entitled to recover. In the opinion of the court, delivered by Chief Justice Campbell, after quoting from *Magone* v. *Wiederer*, *supra*, it was stated:

> "The principle is applicable here when we come to define the meaning of the word parts in the acts in question.

> Where the articles, as those we are concerned with, are applicable for use in different kinds of machines or appliances and are just as applicable to the one use as to the other they are not distinctively parts of automobiles so as to be taxable under these statutes."

And to the same effect was the decision of the Court of Claims in *Milwaukee Motor Products Co.* v. *United States*, No. H–40, decided October 22, 1928.

The decision of the Court of Claims in the case at bar is in direct conflict with its decision in *Atwater Kent Manufacturing Co.* v. *United States*, *supra*. Moreover, there is even stronger reason for the application of the principle announced in *Magone* v. *Wiederer* to the present case than existed in the case of *Atwater Kent Manufacturing Co.* v. *United States* because timers and coils are essential to the operation of gasoline engines whereas a gascolator, such as is here involved, is not essential.

III.

The provisions of statutes imposing taxes are not to be extended, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out.

From the time of *U. S.* v. *Wigglesworth* (2 Story, 369), to the present date the canon that the provisions of statutes, particularly taxing statutes, are not to be extended by implication, has been uniformly accepted and applied without exception. In *Gould* v. *Gould* (245 U. S. 151), the court said:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen."

In support of this the court cited:

U. S. v. *Wigglesworth*, 2 Story, 369.
Am. Net and Twine Co. v. *Worthington*, *141 U. S.* 468.
Benziger v. *U. S.*, 192 U. S. 38.

See also:

U. S. v. *Temple*, 105 U. S. 96.
U. S. v. *Standard Brewery*, 221 U. S. 220.
U. S. v. *Field*, 255 U. S. 257.
U. S. v. *Merriam*, 263 U. S. 179.
Schwab v. *Doyle*, 258 U. S. 529; 66 Law ed. 747.

And in *United States* v. *Merriam*, 263 U. S. 179, the Court said:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

Clearly the decision of the Court below runs counter to this settled principle of statutory construction. The statutes here involved imposed taxes on sales of parts for articles enumerated in subdivisions (1) and (2) of Sections 900 and 600, namely automobiles and motor cycles. A gascolator is not a part for any of the articles therein enumerated. At most it is only a part for an automobile engine, one of the articles embraced in subdivision (3). No tax was imposed upon parts or accessories for articles enumerated in subdivision (3), hence the effect of the decision of the Court of Claims is to read into the statutes something which the Congress did not say and thereby extend their provisions beyond the clear import of the language used.

IV.

The cases cited by the Court of Claims in support of its decision are not in point.

The case of *Walker Manufacturing Co.* v. *United States*, 65 C. Cls. 394, involved the question of the taxability of lifting jacks especially designed and advertised for use in connection with automobiles, and for no other purpose. The gascolator manufactured and sold by petitioner is not so limited in its use.

Cole Storage Battery Co. v. *United States*, 65 C. Cls. 164, had to do with storage batteries especially designed and advertised for use on or in connection with automobiles. Whether or not they could be used for other purposes, it is a matter of common knowledge that they are necessary to the operation of an automobile propelled by a gasoline engine. A gascolator is not necessary to an automobile engine, but may be and is used generally on various kinds of gasoline engines.

Advance Automobile Accessories Corp. v. *United States*, No. H–3, decided October 22, 1928, is readily distinguishable from the case at bar in that it involved the question of whether repair material (brake and transmission band lining) was subject to tax. This material was used exclusively in the repair of automobiles; that is, to replace worn out brake or transmission band linings. In the form in which sold and taxed it was useful for no other purpose.

Borg and Beck Co. v. *United States*, No. H–437, decided March 11, 1929. This related to clutches especially designed for use on automobile engines.

Edison Storage Battery Co. v. *United States*, No. F–359, decided May 6, 1929. Same in effect as *Cole Storage Battery Co.* v. *United States*, *supra*.

None of the above cases involved the question here presented. This question, it is respectfully submitted, should be settled by the principle laid down in *Magone* v. *Wiederer*, *supra*, which was recognized and followed by the Court of Claims in *Atwater Kent Manufacturing Co.* v. *United States*, and also in

the case of *Milwaukee Motor Products Co.* v. *United States*, No. H–40, decided October 22, 1928.

CONCLUSION.

For the reasons set forth above it is respectfully submitted that this court should grant this petition and review the judgment of the Court of Claims in this case.

Respectfully submitted,

GEORGE M. WILMETH,
Attorney for Petitioner.

Washington, D. C.